No. _____

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1997

CENTRICUT, INCORPORATED and THOMAS ALEY,

Petitioners,

v.

ESAB GROUP, INCORPORATED,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Are petitioners amenable to service of process (as the Court of Appeals concluded) under 18 U.S.C. § 1965(d) of the RICO statute, which expressly authorizes the service of "[a]ll other process" but not a summons, where RICO's § 1965(b) expressly authorizes the nationwide service of a summons but only if "it is shown that the ends of justice require," and no such showing has been made or judicially determined in this case?

Does assertion of nationwide service of process under RICO's § 1965(d) violate the due process clause of the Fifth Amendment -- if, as the Court of Appeals concluded, it may be used to require petitioners to defend a federal RICO claim (and related non-federal claims) in a forum in which the Court of Appeals concluded petitioners lack sufficient minimum contacts to satisfy due process under the Fourteenth Amendment, and assertion of jurisdiction is not needed to carry forth the congressional purpose for nationwide service?

PARTIES TO PROCEEDING

Centricut, LLC is incorrectly identified in the caption as Centricut, Incorporated. John Bergen is a co-defendant but is not a petitioner.

RULE 29.6 LISTING

Centricut, LLC is a New Hampshire Limited Liability Company which is owned 99% by Haverford Industries, also a New Hampshire Limited Liability Company, and 1% by Haverford Valley LC, a Utah Limited Company. Neither company is publicly owned. Centricut, LLC has no subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Centricut, LLC and Thomas Aley respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Fourth Circuit (App. 1) is reported at 126 F.3d 617. The opinion of the United States District Court for the District of South Carolina was issued orally from the bench and is unreported. (App. 33.)

JURISDICTION

The Fourth Circuit issued its opinion on October 17, 1997. (App. 1.) The petitioners' timely motion for a rehearing was denied on November 14, 1997. (App. 47.) The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part that "[n]o person

shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

The Racketeer Influenced and Corrupt Organizations Act (RICO) was enacted as Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified as amended at 18 U.S.C. § 1961, et seq. (1989 & Supp. 1997)).

Section 1965, which is titled "venue and process", provides in pertinent part as follows:

> (a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.
> (b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpoena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

STATEMENT

This action was commenced in United States District Court based upon diversity of citizenship jurisdiction, 28

U.S.C. § 1332, and federal question jurisdiction based upon a cause of action under 18 U.S.C. § 1965 (RICO).

The plaintiff is a Delaware corporation engaged in the worldwide manufacturing and sale of welding and cutting devices, with its current principal place of business in Florence, South Carolina. It has 2200 employees and hundreds of millions of dollars in annual sales.

The petitioner Centricut is a small, New Hampshire limited liability company, with its principal place of business in New Hampshire. It sells consumable parts exclusively by mail order for some equipment manufactured by the plaintiff and competitors of the plaintiff. The petitioner Thomas Aley is the former chief executive officer of Centricut who started the company operating out of his house in 1986 and who is now retired and resides in New Hampshire and Florida. The defendant John Bergen (not a petitioner) is a former employee of the plaintiff, and at all times was a citizen and resident of Florida.

The plaintiff asserted eight causes of action seeking damages and equitable relief. The essence of these claims is that Centricut, through its former president, Thomas Aley, located in New Hampshire, arranged to secure customer lists of plaintiff through John Bergen, a former

employee and sales representative of the plaintiff who resided in Florida. Plaintiff asserts that the customer lists and trade information were confidential. The United States District Court concluded that petitioners' contacts with South Carolina were sufficient to confer diversity of citizenship jurisdiction because the effects of its conduct could be felt in South Carolina since the plaintiff corporation was now headquartered in South Carolina. The district court did not reach the issue of whether jurisdiction was present under the RICO count.

The Fourth Circuit Court of Appeals granted an interlocutory appeal and reversed the district court. The Fourth Circuit concluded that neither general nor specific jurisdiction was established by the plaintiff, and that the due process clause of the Fourteenth Amendment prevented the exercise of jurisdiction pursuant to South Carolina's long arm statute. The court concluded that petitioners' contacts in this case were "too attenuated and insubstantial to provide a constitutionally sufficient basis for South Carolina courts to exercise either specific or general *in personam* jurisdiction over Centricut . . . ." 126 F.3d at 626 (App. 18.)

The Fourth Circuit concluded that because the plaintiff had asserted a claim under RICO, the nationwide service of process provisions of RICO invoked jurisdiction, and that although the exercise of jurisdiction based upon the petitioners' contacts with the State of South Carolina would offend the due process clause of the Fourteenth Amendment, the Fifth Amendment due process provisions did not constrain the exercise of jurisdiction based upon a federal claim. The court also permitted the remaining seven causes of action to be adjudicated based upon pendent jurisdiction.

The facts recited by the Fourth Circuit explain how attenuated the petitioners' contacts are with the District of South Carolina. The court acknowledged that Centricut's business was conducted entirely through mail order, and that it has no offices or sales representatives in South Carolina, no property in South Carolina, no phone listings, and has never paid South Carolina taxes. No Centricut employee has ever even travelled to South Carolina for any business purpose. In 1995, Centricut had twenty-six customers who resided in South Carolina, for a gross sales dollar amount of $66,552, which represented less than one percent of its annual sales of $8,459,000.

The Fourth Circuit also concluded that all dealings between the petitioners Centricut and Aley with Bergen, a Florida resident, took place in New Hampshire and Florida.

> The only South Carolina 'contact' related to this suit is that Centricut and Aley knew that the sales leads that Bergen supplied might, if fruitful, ultimately result in less sales to the ESAB Group, which was headquartered in South Carolina. 126 F.3d at 625 (App. 16).

The Fourth Circuit also concluded that the evidence revealed that leads provided by Bergen were located throughout the United States and Canada, but

> only one such company appears to have been located in South Carolina, and the evidence presented indicates that no sales in South Carolina were ever made based upon Bergen's leads. This activity, standing alone, does not support proof of an intent by Centricut to avail itself of the privilege of conducting activities in South Carolina. Id.

Indeed, when the relationship began with Bergen in 1986, he was not even associated with the plaintiff. When Bergen

was employed by the plaintiff in 1987, he reported to Colorado, and continued to do so until 1993.

The Fourth Circuit recognized that the Fifth Amendment due process clause "protects the liberty interests of individuals against unfair burden and inconvenience." 126 F.3d at 626 (App. 21). It suggests that the defendant must prove extreme inconvenience or unfairness to outweigh the congressional policy of nationwide service of process. 126 F.3d at 627 (App. 22).

The defendants' lack of meaningful conduct with South Carolina, the defendants' small sales, the distance from New Hampshire to South Carolina, the fact that the court had concluded the petitioners did not purposefully avail themselves of the benefits of South Carolina, or the fact that the petitioners would be required to engage South Carolina counsel to defend the eight broadly alleged causes of action did not establish to the court's satisfaction "such extreme inconvenience or unfairness as would outweigh the congressionally articulated policy of allowing the assertion of *in personam* jurisdiction in South Carolina." Id. The Fourth Circuit failed to consider that rights conferred to the plaintiff in the RICO statute could be fully vindicated in

districts in which the center of the alleged wrongful activity occurred.

REASONS FOR GRANTING THE PETITION

I. QUESTION ONE.

The Court of Appeals held that RICO's nationwide service of process provision is embodied in 18 U.S.C. § 1965(d), which provides that "[a]ll other process . . . may be served on any person in any judicial district in which such person resides, is found, has an agent or transacts his affairs." Id. The court's decision is in accord with the Eleventh Circuit's decision in Republic of Panama v. BCCI Holdings (Luxembourg) S.A., 119 F.3d 935, 942 (11th Cir. 1997), but is in direct conflict with decisions of the Seventh and Ninth Circuits that hold that RICO's nationwide service of process provision is contained in § 1965(b). See Stauffacher v. Bennett, 969 F.2d 455, 460 (7th Cir. 1992); Lisak v. Mercantile Bancorp, Inc., 834 F.2d 668, 671-73 (7th Cir. 1987); Butcher's Union Local No. 498 v. SDC Inv., Inc., 788 F.2d 535, 539 (9th Cir. 1986). The difference is significant. Section 1965(b) authorizes the service of a summons by "any district court of the United States in which it is shown that the ends of justice require."

Section 1965(d) expressly authorizes service of "[all] other process" but not a summons. To allow § 1965(d) to be used to serve a summons and thereby acquire personal jurisdiction over a defendant would render superfluous § 1965(b) and circumvent the "ends of justice" safeguard on nationwide service of process on a party.

The question is also important. A number of district courts have also split on the question and some have allowed § 1965(d) to be used to acquire personal jurisdiction over RICO defendants. The abuse of civil RICO is well known and this jurisdictional issue needs to be resolved to avoid further needless abuse of RICO by litigants using § 1965(d) to forum shop or piggyback non-federal claims into courts of the United States that would otherwise lack jurisdictional basis to adjudicate such claims.

A. THE FOURTH CIRCUIT'S OPINION CONFLICTS WITH DECISIONS FROM THE SEVENTH AND NINTH CIRCUITS

In enacting RICO, Congress provided a civil remedy for private litigants and a provision for nationwide service of process on parties. Section 1965 contains RICO's venue and service of process provisions. The question petitioners seek to have the Court resolve is whether national service

of a summons is authorized by § 1965(b), as the Seventh and Ninth Circuits have held, or by 1965(d), as the Fourth and Eleventh Circuits have held. See Stauffacher v. Bennett, 969 F.2d 455, 460 (7th Cir. 1992); Lisak v. Mercantile Bancorp, Inc., 834 F.2d 668, 671-73 (7th Cir. 1987); Butcher's Union Local No. 498 v. SDC Inv., Inc., 788 F.2d 535, 539 (9th Cir. 1986); ESAB Group, Inc. v. Centricut, Inc., 126 F.3d 617, 626 (4th Cir. 1997); Republic of Panama v. BCCI Holdings (Luxembourg) S.A., 119 F.3d 935, 942 (11th Cir. 1997).

The Fourth Circuit apparently construed 1965(b) to be a supplemental venue provision, (126 F.3d at 627) (App. 23), a view articulated by a number of district courts. See, e.g., BankAtlantic v. Coast to Coast Contractors, Inc., 947 F. Supp. 480, 485-91 (S.D. Fla. 1996); Bridge v. Invest America, Inc., 748 F. Supp. 948, 950-53 (D.R.I. 1990). For the reasons that follow, this reading of § 1965(b) is erroneous.

> According to RICO's legislative history:
>
> Section 1965 contains broad provisions regarding venue and process, ...
>
> Subsection (a) establishes venue for civil proceedings . . . .

> Subsection (b) provides nationwide service of process on parties, if the ends of justice require it, in actions under Section 1964.
>
> Subsection (c) provides nationwide subpoena power for witnesses in civil or criminal proceedings . . . .
>
> Subsection (d) provides that all other process in actions under the chapter may be served wherever the person resides, is found, has an agent, or transacts his affairs.

H. Rep. No. 91-1549, at 28 (1970), reprinted in 1970 U.S.C.C.A.N. 4007, 4034.

RICO's legislative history thus supports the views of the Seventh and Ninth Circuits that § 1965(b) and not § 1965(d) authorizes "nationwide service of process on parties, if the ends of justice require it." 1970 U.S.C.C.A.N. at 4034 (emphasis added). The language of the statute also supports this view.

Section 1965(a) is a venue provision that permits venue in RICO actions to be located in any district in which the defendant "resides, is found, has an agent, or transacts his affairs." A. Darby Dickerson, Curtailing Civil RICO's Long Reach: Establishing New Boundaries for Venue and

Personal Jurisdiction Under 18 U.S.C. § 1965, 75 Neb. L. Rev. 476, 495 (1996) ("Neither the language of nor legislative history explaining [§ 1965(a)] can be used to transform it into a jurisdictional provision."). Accordingly, § 1965(a) may not be used to establish personal jurisdiction over petitioners in South Carolina.

Section 1965(b) expressly authorizes a district court to issue process for the purpose of summoning additional parties to be brought before the court if the ends of justice require it:

> In any [RICO] action under section 1964 of this chapter in any district court . . . in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district . . . .

18 U.S.C. § 1965(b). "Section 1965(b) was enacted to enable a plaintiff to bring before a single court, in a single trial, all members of an alleged nationwide RICO conspiracy." Dickerson, supra, at 502 (footnotes omitted). It can only be used when the "ends of justice" require:

> Two factors upon which many courts agree are that § 1965(b) cannot be triggered unless (1) at least one RICO defendant is amenable to venue under § 1965(a) or § 1391 and (2) no other federal district court can exercise venue or jurisdiction over all RICO defendants. Courts use these factors to close a potential "jurisdictional gap" that would require the same RICO action to be tried piecemeal in several judicial districts.

Dickerson, supra, at 517-18. Likewise, as the Ninth Circuit stated in its Butcher's Union opinion,

> [f]or nationwide service to be imposed under section 1965(b), the court must have personal jurisdiction over at least one of the participants in the alleged multidistrict conspiracy and the plaintiff must show that there is no other district in which a court will have personal jurisdiction over all of the alleged co-conspirators.

788 F.2d at 539; see, e. g., Lisak, 834 F.2d at 672; PT United Can Co., Ltd. v. Crown Cork & Seal Co., No. 96-C-3669, 1997 WL 31194, at *3 (S.D.N.Y. Jan. 28, 1997);

Hawkins v. Upjohn Co., 890 F. Supp. 601, 605 (E.D. Tex. 1994); LeDuc v. Kentucky Cent. Life Ins. Co., 814 F. Supp. 820, 826 (N.D. Cal. 1992); Magic Toyota, Inc. v. Southeast Toyota Distribs., Inc., 784 F. Supp. 306, 310-12 (D.S.C. 1992); Anchor Glass Container v. Stand Energy Corp., 711 F. Supp. 325, 330 (S.D. Miss. 1989).

In the present case, § 1965(b) may not be used to acquire personal jurisdiction over petitioners in South Carolina because there exists another district, New Hampshire, where all defendants are amenable to service of a summons and are subject to the court's *in personam* jurisdiction.

In contrast to § 1965(b), § 1965(d) does not speak to the power of a court to summon parties to appear before it. "Subsection (d) is merely a service of process provision for process other than a summons. To read subsection (d) in any other way would render subsection (b) superfluous." Dickerson, supra, at 496 (footnotes omitted).

> If a plaintiff can rely on § 1965(d) without any prerequisites, why would a plaintiff ever rely on § 1965(b), when that section requires them to establish venue over at least one other RICO defendant under § 1965(a) and

> to pass the "ends of justice" test? Accordingly, § 1965(d) should be used not as a venue statute, but as a service statute for process other than a summons, such as subpoenas issued by private parties. Therefore, the only RICO provision that can be used to establish personal jurisdiction over a defendant is 1965(b).

Dickerson, supra, at 515 (footnotes omitted); see also PT United Can, 1997 WL 31194, at *3; Hawkins, 890 F. Supp. at 606 n.8. Accordingly 1965(d) may not be used to summon petitioners to appear in South Carolina and the Fourth Circuit's conclusion to the contrary is erroneous.

B. THE QUESTION IS IMPORTANT

The question on which petitioners seek review is also important. "Virtually everyone who has addressed the question agrees that civil RICO is now being used in ways that Congress never intended when it enacted the statute in 1970." Remarks of the Chief Justice, 21 St. Mary's L.J. 5, 9 (1989). RICO has been used to federalize garden variety commercial fraud cases that heretofore were the province of the state courts. Id. at 10. RICO filings have become a

significant factor impacting on the work loads of federal trial and appellate judges. See id. at 9.

The number of district courts that have erroneously read § 1965(d) to permit nationwide service of a summons is substantial. See, e.g., BankAtlantic v. Coast to Coast Contractors, Inc., 947 F. Supp. 480, 485 (S.D. Fla. 1996); Headwear, U.S.A., Inc. v. Stange, 166 F.R.D. 36, 38 (D. Kan. 1996); Kondrath v. Arum, 881 F. Supp. 925, 929 (D. Del. 1995); Caterpillar, Inc. v. Jerryco Footwear, Inc., 880 F. Supp. 578, 586 (C.D. Ill. 1994); Monarch Normandy Square Partners v. Normandy Square Assocs. Ltd. Partnership, 817 F. Supp. 896, 898 (D. Kan. 1993); Dooley v. United Tech. Corp., 786 F. Supp. 65, 70-71 (D.D.C. 1992) (collecting cases); Bridge v. Invest America, Inc., 748 F. Supp. 948, 951 (D.R.I. 1990) (collecting cases).

The amount of national wealth that has been destroyed by these erroneous decisions is unknown, but it is, without a doubt, enormous. This misreading of § 1965(d) by district courts, the Eleventh Circuit and now the Fourth Circuit has resulted, and will continue to result, in unwarranted forum shopping by RICO plaintiffs. This misreading of § 1965(d) has resulted, and will continue to result, in an additional and unwarranted burden on private

litigants forced to defend RICO and non-federal pendent claims in federal forums that would otherwise lack *in personam* jurisdiction. This misreading of § 1965(d) also circumvents safeguards on nationwide service of a process on parties that Congress built into § 1965(b). In so doing, the various district courts cited above, the Eleventh Circuit, and now the Fourth Circuit have raised serious constitutional questions under this application of § 1965(d) that are discussed under Question Two in this petition.

II. QUESTION TWO.

The Fourth Circuit's opinion is in direct conflict with this Court's discussion in Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites, 456 U.S. 694 (1982). There this Court stated:

> The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty. Thus, the test for personal jurisdiction requires that "the maintenance of the suit. . .not offend 'traditional notions of fair play and substantial justice.'"

456 U.S. at 702 (footnotes omitted).

The Fourth Circuit concluded that the petitioners did not purposefully avail themselves of the benefits of conducting their affairs in South Carolina, and any conduct with South Carolina was too attenuated to confer personal jurisdiction. The individual liberty interest defined above cannot be commandeered by Congress declaring a generalized need for nationwide service of process. Certainly, with the financial resources of the plaintiff, any congressional policy can be served by the action proceeding in New Hampshire.

This case is of national importance because, based upon the Fourth Circuit's opinion, a plaintiff in a routine commercial tort claim can allege a RICO count and piggyback seven claims over which the court otherwise admittedly could not assert jurisdiction without offending the due process clause of the Fourteenth Amendment. This is particularly important since the due process clauses of each amendment have at their core the protection of individual liberty and fairness. See, e.g., Honeywell, Inc. v. Metz Apparatewerke, 509 F.2d 1137 (7th Cir. 1975).

> [W]e can perceive no operative difference between the concept of due process as

> applied to the states and as applied to the federal government. This and other courts have reached this result, explicitly or tacitly, and have applied the 'minimum contacts' standard to federal question cases in which *in personam* jurisdiction was at issue, and we deem it appropriate to do so here.

509 F.2d at 1143.

While a thoroughly developed body of case law exists regarding the due process limitations upon the assertion of extra territorial jurisdiction for state law claims, "the Supreme Court has never addressed the scope of due process protection under the Fifth Amendment in the jurisdictional context." Republic of Panama v. BCCI Holdings (Luxembourg) S. A., 119 F.3d 935, 944 (11th Cir. 1997).

Professors Wright and Miller observe that Congress's supposed power to provide for nationwide service of process does not settle the issue. Moreover, the authors aptly observe:

> [I]f the Due Process Clause truly places no restrictions on the proliferation and use of federal service statutes, the defendant's right

> to a fair forum could be rendered entirely meaningless. If due process is to have any application at all in federal cases--and the Fifth Amendment requires that it does--it seems impossible that Congress could empower a plaintiff to force a defendant to litigate any claim, no matter how trifling, in whatever forum the plaintiff chooses, regardless of the burden on the defendant.

4 Charles A. Wright and Arthur R. Miller, Federal Practice & Procedure § 1067.1, at 328-29 (1987).

The Fourth Circuit opinion simply ignores the liberty interest protected by the due process clause. Moreover, it establishes an improper test, that the defendant must establish "extreme inconvenience," for the tests historically used to define traditional notions of fair play and substantial justice. See Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). Moreover, the Fourth Circuit reached this conclusion without the benefit of a finding of fact by the district court since the district court had not reached the issue of RICO based jurisdiction.

The national importance of this issue is best articulated in Dickerson, supra, at 478-80. There the author

notes the frequency that RICO is added as a claim for forum shopping purposes and

> to circumvent the stricter venue and jurisdictional rules that would otherwise apply to their clients' 'garden variety' claims; and to corral defendants into an inconvenient jurisdiction with which they may have no contacts.

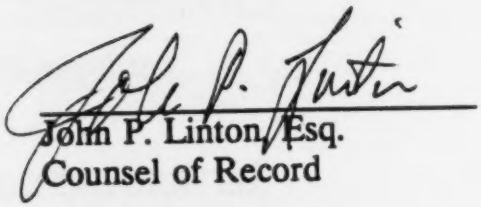
Id. at 480 (footnotes omitted).

The author points out the different tests used by at least two other circuits. Compare Lisak v. Mercantile Bancorp. Inc., 834 F.2d 668 (7th Cir. 1987), with Butcher's Union Local No. 498 v. SDC Inv., Inc., 788 F.2d 535 (9th Cir. 1986).

CONCLUSION

The Fourth Circuit opinion misapplies the RICO statute, and does so under circumstances that violate Petitioners' Fifth Amendment due process rights. The decision should be reversed and vacated, and remanded. In the alternative, the petition for writ of certiorari should be granted.

Respectfully submitted,



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February, 1998

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

96-2504

ESAB GROUP, INCORPORATED,

Plaintiff-Appellee,

v.

CENTRICUT, INCORPORATED;

Thomas Aley, Defendants-Appellants,

and

John Bergen; Thomas Fitzpatrick; Gordon Thomas Aley; Linda Aley, d/b/a Corbin Consulting; Mark Lindberg, Defendants.

Decided: October 17, 1997.

Before NIEMEYER, MICHAEL, and MOTZ, Circuit Judges.

OPINION

NIEMEYER, *Circuit Judge*:

In this case we must determine whether the district court in South Carolina obtained personal jurisdiction over New Hampshire defendants pursuant to a complaint alleging a civil RICO claim and related state law claims. The district court, relying on South Carolina's long-arm statute, found that the defendants' intentional tortious conduct directed at the South Carolina plaintiff supplied sufficient minimum

contacts to satisfy the requirements of the South Carolina statute and the Fourteenth Amendment.

For reasons that follow, we disagree with the district court's rationale. But we nonetheless affirm the district court's finding of personal jurisdiction over the defendants because of the nationwide service of process authorized by the RICO statute and the doctrine of pendent personal jurisdiction.

I

The ESAB Group, Inc. is a Delaware corporation located in Florence, South Carolina, which engages in the business of developing and manufacturing welding and cutting systems. In its amended complaint against Centricut, Inc., Thomas Aley, and others, the ESAB Group alleged that Centricut and Aley participated in a conspiracy to appropriate the ESAB Group's trade secrets and customer lists. The complaint alleged that they accomplished this with the assistance of John Bergen, a Florida resident who served as an ESAB Group sales representative in Florida from 1980 to 1984 and as the ESAB Group's regional sales manager in Florida from 1987 to 1995. The ESAB Group charged in its amended complaint that the misappropriation was effected "pursuant to an intentional plan ... to appropriate

Plaintiff's business" and by means of a "scheme or artifice to defraud." The complaint contains six counts based on state law, alleging conspiracy, intentional interference with economic relations, breach of contract accompanied by a fraudulent act, South Carolina Unfair Trade Practices Act violations, misappropriation of trade secrets, intentional interference with prospective contractual relations, and entitlement to equitable relief. It also contains a count for civil RICO based on 18 U.S.C. § 1962.

Centricut is a New Hampshire limited liability company that manufactures and sells replacement parts for cutting machines, and arguably competes to some degree with the ESAB Group. Centricut conducts its business entirely through mail order. It has no offices or sales representatives in South Carolina; it has no property in South Carolina; it has no phone listings there; and it has never paid South Carolina taxes. Moreover, it claims that no employee has ever traveled to South Carolina "for any purpose." As of 1995, Centricut did have 26 customers who resided in South Carolina, constituting 1% of all of its customers and representing .079% of its gross annual sales. It also purchased on one occasion between $10,000 and $20,000 worth of parts from a South Carolina supplier.

Centricut stated that it had never targeted formal advertising at South Carolina, having only once published formal advertising in a trade journal of national circulation.

Aley, Centricut's CEO at the time, stated in an affidavit that he was a New Hampshire resident until November 1995 and a Florida resident thereafter. He stated that for the past 25 to 30 years he has never been in South Carolina and that he has conducted no business and owns no property there.

Centricut and Aley filed several motions, one of which sought to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(2), alleging that their contacts with South Carolina were insufficient to subject them to personal jurisdiction there. The ESAB Group responded that the defendants "purposefully directed their activities toward the State of South Carolina and its corporate citizens, and this litigation arises from those activities." The ESAB Group claimed alternatively that the court had personal jurisdiction over the defendants by reason of the nationwide service of process in RICO actions permitted by 18 U.S.C. § 1965(b).

The district court denied the motion to dismiss, holding that it had personal jurisdiction over Centricut and Aley, based

on "the effects test" drawn from Calder v. Jones, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984). The district court said that because Centricut's actions "were designed to damage the [South Carolina] plaintiff ... and did damage the plaintiff," it was fair to hale Centricut into a South Carolina court. The district court granted leave to the defendants to file an interlocutory appeal under 28 U.S.C. § 1292(b), and we did likewise.

II

Federal district courts may exercise in personam jurisdiction only to the degree authorized by Congress acting under its constitutional power to "ordain and establish" the lower federal courts. U.S. Const. art. III, § 1; see also id. art. I, § 8, cl. 9. The exercise of personal jurisdiction is also constrained by the Due Process Clause of the Fifth Amendment. See Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 103-04, 108 S.Ct. 404, 409, 98 L.Ed.2d 415 (1987). As prerequisites to exercising personal jurisdiction over a defendant, a federal court must have jurisdiction over the subject matter of the suit, venue, "a constitutionally sufficient relationship between the defendant and the forum," and "authorization for service of a summons on the person." Id. at 104, 108 S.Ct. at 409.

Thus, a federal court's exercise of jurisdiction over a person is closely linked to effective service of process.

Federal Rule of Civil Procedure 4(k)(1) provides that "[s]ervice of a summons or filing a waiver of service is effective to establish [a federal court's] jurisdiction over the person of a defendant" if such service is accomplished on a defendant whom the law has made amenable to the court's process. See also Omni Capital, 484 U.S. at 104, 108 S.Ct. at 409. Rule 4(k) enumerates five sources authorizing service to effect in personam jurisdiction: (1) state law; (2) Federal Rules of Civil Procedure 14 and 19 (relating to third party practice and joinder), provided service is effected "not more than 100 miles from the place from which the summons issues"; (3) the federal interpleader statute, 28 U.S.C. § 1335; (4) federal statute; and (5) Federal Rule of Civil Procedure 4(k)(2) itself, to enforce claims "arising under federal law" on defendants who are not subject to the jurisdiction of any state.

In the district court, the ESAB Group argued that it had served the defendants in the manner specified by South Carolina's long-arm statute, S.C.Code Ann. §§ 36-2-803(1)(c) & (d), and by RICO, 18 U.S.C. § 1965.

Because the district court held that the ESAB Group had effectively served the defendants under South Carolina's long-arm statute, the court did not address whether service was effective under the RICO statute.

When authorized by Federal Rule of Civil Procedure 4(k)(1)(A), service of process sufficient to exercise jurisdiction over a defendant is limited by state law, so that any challenge to the personal jurisdiction requires us to assess the jurisdiction of the courts in the state where the district court is located. Centricut and Aley contend that service on them under South Carolina's long-arm statute crossed the boundaries of that statute as constrained by the Fourteenth Amendment and that the district court erred in finding such service effective.

Since in personam jurisdiction of a state court is limited by that state's laws and by the Fourteenth Amendment, we first inquire whether the state long-arm statute authorizes the exercise of jurisdiction over the defendant. See Wolf v. Richmond County Hosp. Auth., 745 F.2d 904, 909 (4th Cir.1984). If it does, we must then determine whether the state court's exercise of such jurisdiction is consistent with the Due Process Clause of the Fourteenth Amendment. See

id. Because Rule 4(k)(1)(A) delimits the scope of effective federal service in terms of the limits on state court jurisdiction, our inquiry into the federal court's jurisdiction pursuant to Rule 4(k)(1)(A) incorporates the Fourteenth Amendment due process standard, even though that Amendment applies of its own force only to states. See U.S. Const. amend. XIV, § 1 ("No State shall ...."); see generally 4 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1067.1 (Supp.1997) (implicit in Rule 4(k)(2) "is the concept that a federal district court must employ a state long-arm statute and use a Fourteenth Amendment due process analysis to assess the exercise of personal jurisdiction over a non-resident of the forum state").

South Carolina's long-arm statute provides in relevant part:

> A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's ... (c) commission of a tortious act in whole or in part in the State; [or] (d) causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business, or

> engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this State.

S.C.Code Ann. §§ 36-2-803(1)(c) & (d). South Carolina's long-arm statute has been interpreted to reach the outer bounds permitted by the Due Process Clause. See Southern Plastics Co. v. Southern Commerce Bank, 310 S.C. 256, 423 S.E.2d 128, 130 (1992); Hammond v. Cummins Engine Co., 287 S.C. 200, 336 S.E.2d 867, 868 (1985); Triplett v. R.M. Wade & Co., 261 S.C. 419, 200 S.E.2d 375, 379 (1973); see also Federal Ins. Co. v. Lake Shore, Inc., 886 F.2d 654, 657 n. 2 (4th Cir.1989). Consequently, "the statutory inquiry necessarily merges with the constitutional inquiry, and the two inquiries essentially become one." Stover v. O'Connell Assocs., Inc., 84 F.3d 132, 135-36 (4th Cir.1996). We thus turn to the constitutional question of whether Centricut and Aley have established "minimum contacts with [South Carolina] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L.Ed. 278 (1940)).

As we explained more fully in Lesnick v. Hollingsworth & Vose Co., 35 F.3d 939, 941-46 (4th Cir.1994), and reiterated in Stover, 84 F.3d at 136, the jurisprudence of minimum contacts has developed as a surrogate for presence in the state because "[a] state's sovereignty remains territorial, and its judicial power extends over only those persons, property, and activities within its borders." Id. A state's laws "have no operation in other states except as allowed by those states or by comity." Id. The question, then, is whether a defendant's contacts with the forum state are so substantial that they amount to a surrogate for presence and thus render the exercise of sovereignty just, notwithstanding the lack of physical presence in the state. "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958). Such activities need not involve physical presence in the state, but must still be "purposefully directed toward the forum state." Lesnick, 35 F.3d at 945; see also Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475-76, 105 S.Ct. 2174, 2184, 85 L.Ed.2d 528 (1985).

It is now generally accepted that when the plaintiff's cause of action does not arise from the defendant's contacts with the forum state so as to provide "specific jurisdiction" for the claim based on the " 'relationship among the defendant, the forum, and the litigation,' " Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414, 104 S.Ct. 1868, 1872, 80 L.Ed.2d 404 (1984) (quoting Shaffer v. Heitner, 433 U.S. 186, 204, 97 S.Ct. 2569, 2579, 53 L.Ed.2d 683 (1977)), "general jurisdiction" may nevertheless be asserted over a defendant whose activities in the forum state have been "continuous and systematic." Id. at 414-15, 104 S.Ct. at 1872 (citations omitted) But the threshold level of minimum contacts to confer general jurisdiction is significantly higher than for specific jurisdiction. See generally 4 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1067, at 295-98 (1987)("threshold contacts required for general jurisdiction are very substantial, indeed"). In the case before us, the ESAB Group argues that standards for both general and specific jurisdiction have been met. We will address each in order.

A

The ESAB Group contends that Centricut and Aley have sufficiently "continuous and systematic" contacts with

South Carolina to justify its exercise of general in personam jurisdiction, presumably under S.C.Code Ann. § 36-2-803(1)(d). We disagree.

Although 26 of Centricut's customers reside in South Carolina, all are mail order customers and Centricut does not service them in South Carolina. It maintains no sales representatives or other agents there, and the business attributable to Centricut's South Carolina customers constitutes less than one- tenth of one percent of its nationwide sales volume. These contacts, we believe, fall far short of the more extensive contacts that we have found sufficient in our general jurisdiction cases.

In Ratliff v. Cooper Labs., Inc., 444 F.2d 745, 748 (4th Cir.1971), we held that where a defendant does no more than advertise and employ salesmen in a forum state, such contacts are not sufficient to justify general jurisdiction. We followed Ratliff with our decision in Lee v. Walworth Valve Co., 482 F.2d 297 (4th Cir.1973), in which we upheld general jurisdiction over a company whose annual sales in the forum were approximately $200,000 and where sales representatives spent approximately 80 days per year in the forum state. But the exercise of jurisdiction there

was unusual because it was supported in part by the fact that the cause of action arose on the high seas and thus did not arise within the sovereign boundaries of any of the United States. Our decisions since Lee make clear that even the contacts in Lee were marginal.

In Wolf, for example, we found no general jurisdiction based on a Georgia hospital's substantial, though largely unsolicited contacts with South Carolina. We explained that Lee was informed by the consideration of "whether there [was] 'any other state whose courts might provide a more likely forum.' " 745 F.2d at 912 (quoting Lee, 482 F.2d at 299). Finally, in Nichols v. G.D. Searle & Co., 991 F.2d 1195 (4th Cir.1993), we followed Ratliff and held that a court in Maryland could not assert general jurisdiction over a company that employed 13 Maryland residents as sales representatives and one Maryland resident as a district manager. Moreover, the defendant held district meetings three times annually in Maryland, held regional and national meetings twice annually, and had between $9 million and $13 million annual sales in Maryland, constituting two percent of its total sales. In addition, the defendant contracted with the Maryland firm for pharmaceutical research and made roughly one percent of its annual

purchases in Maryland. Although the fact that none of the plaintiffs in Nichols were Maryland residents entered into our analysis, see id. at 1199 n. 3, residency alone was not dispositive of the issue of whether the defendant had sufficient contacts to warrant jurisdiction. See Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 779-80, 104 S.Ct. 1473, 1481, 79 L.Ed.2d 790 (1984) ("[p]laintiff's residence in the forum State is not a separate requirement, and lack of residence will not defeat jurisdiction established on the basis of defendant's contacts"). Indeed, a forum state's interest in adjudicating the claims is merely one factor to consider once the defendant's contacts with the state have been established. See, e.g., id.

When compared with the level of contacts that we found insufficient in both Ratliff and Nichols, Centricut's contacts with South Carolina are far less extensive. Moreover, we do not find Centricut's contacts to be constitutionally sufficient even when we consider that, unlike Nichols, South Carolina courts in this case would be seeking to vindicate the interests of their own citizens. Centricut's South Carolina contacts are not even as extensive as those present in Lee, where there was the additional consideration that no state had an obvious connection with the cause of

action. In sum, we conclude that South Carolina may not exercise general jurisdiction over Centricut and Aley consistent with the constitutional guarantee of due process. Accordingly, a federal district court cannot do so pursuant to Federal Rule Civil Procedure 4(k)(1)(A).

B

Even if Centricut's contacts with South Carolina are not sufficiently continuous and systematic to justify general jurisdiction, the ESAB Group contends that specific jurisdiction may nonetheless be exercised as to the causes of action before the court. With respect to specific jurisdiction, "[t]he touchstone ... remains that an out-of-state person have engaged in some activity purposefully directed toward the forum state." Lesnick, 35 F.3d at 945. The contacts related to the cause of action must create a "substantial connection" with the forum state, see McGee v. International Life Ins. Co., 355 U.S. 220, 223, 78 S.Ct. 199, 201, 2 L.Ed.2d 223 (1957), although this connection need not be as extensive as is necessary for general jurisdiction. As with general jurisdiction, however, the defendant's actions must be directed at the forum state in more than a random, fortuitous, or attenuated way. See Burger King, 471 U.S. at 475, 105 S.Ct. at 2183-84; Keeton, 465 U.S. at 774, 104 S.Ct. at 1478; World-Wide Volkswagen Corp.

v. Woodson, 444 U.S. 286, 299, 100 S.Ct. 559, 568, 62 L.Ed.2d 490 (1980).

In the case before us, New Hampshire residents Centricut and Aley allegedly entered into a relationship with Bergen, a resident of Florida. All relations among the three were carried out in and between New Hampshire and Florida. The only South Carolina "contact" related to this suit is that Centricut and Aley knew that the sales leads that Bergen supplied might, if fruitful, ultimately result in less sales to the ESAB Group, which was headquartered in South Carolina. Indeed, at the very most, it can be said that Centricut intended to gain a competitive advantage (allegedly tortiously) over the ESAB Group by making sales which the ESAB Group might otherwise have made. We believe, however, that such knowledge and intent is too attenuated to constitute a "substantial connection" with South Carolina. The evidence presented indicates that Bergen's leads were for companies located across the United States and Canada. Only one such company appears to have been located in South Carolina, and the evidence presented indicates that no sales in South Carolina were ever made based upon Bergen's leads. This activity, standing alone, does not support proof of an intent by

Centricut to avail itself of the privilege of conducting activities in South Carolina. See Hanson, 357 U.S. at 253, 78 S.Ct. at 1239-40 ("The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state"). Nor does it manifest behavior intentionally targeted at and focused on South Carolina, see Calder v. Jones, 465 U.S. 783, 789-90, 104 S.Ct. 1482, 1486-87, 79 L.Ed.2d 804 (1984) (jurisdiction of forum state upheld where libel "expressly aimed" at forum state with knowledge that "potentially devastating impact" would be felt there), such that Centricut can be said to have "entered" South Carolina in some fashion, see Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd. Partnership, 34 F.3d 410, 412 (7th Cir.1994) (discussing Calder). Instead, Centricut focused its activities more generally on customers located throughout the United States and Canada without focusing on and targeting South Carolina. Cf. Calder, 465 U.S. at 789, 104 S.Ct. at 1486 (distinguishing case before it from "untargeted" conduct).

The ESAB Group contends, however, that, wherever the sales were made by Centricut, and thus lost by the ESAB Group, they were ultimately felt in South Carolina at the

ESAB Group's headquarters. While this is undoubtedly true, when unaccompanied by other contacts, it is ultimately too unfocused to justify personal jurisdiction. See Indianapolis Colts, 34 F.3d at 412 (noting that in cases upholding jurisdiction based on injury in the forum state to intellectual property or reputation, "[t]he defendant had also'entered' the state in some fashion"). Instead of grounding jurisdiction on a defendant's decision to "purposely avail[ ] itself of the privilege of conducting activities within the forum state," Hanson, 357 U.S. at 253, 78 S.Ct. at 1240, or on a defendant's activities "expressly aimed" at the forum state, Calder, 465 U.S. at 789, 104 S.Ct. at 1487, jurisdiction would depend on a plaintiff's decision about where to establish residence. Such a theory would always make jurisdiction appropriate in a plaintiff's home state, for the plaintiff always feels the impact of the harm there. Although the place that the plaintiff feels the alleged injury is plainly relevant to the inquiry, it must ultimately be accompanied by the defendant's own contacts with the state if jurisdiction over the defendant is to be upheld. Because those contacts in this case were too attenuated and insubstantial to provide a constitutionally sufficient basis for South Carolina courts to exercise either specific or general in personam jurisdiction over Centricut,

the district court could not exercise in personam jurisdiction pursuant to service under Rule 4(k)(1)(A).

III

Although we conclude that personal jurisdiction may not be exercised over Centricut and Aley under Federal Rule of Civil Procedure 4(k)(1)(A) because a South Carolina court could not assert such jurisdiction, we must now address the ESAB Group's alternative basis for personal jurisdiction based on 18 U.S.C. § 1965(b).

One of the sources enumerated in Federal Rule of Civil Procedure 4(k) for service that effectively enables the exercise of personal jurisdiction over a defendant is "a statute of the United States." See Fed.R.Civ.P. 4(k)(1)(D). In this case, a federal statute does authorize such service.

In enacting the Organized Crime Control Act of 1970, Pub.L. No. 91-452, 84 Stat. 922 (1970), reprinted in 1970 U.S.C.C.A.N. 1073, Congress prohibited various activities generally associated with organized crime. See 18 U.S.C. § 1962. In addition to providing criminal penalties, see 18 U.S.C. § 1963, Congress granted a private civil right of action to "[a]ny person injured in his business or property by reason of a violation of" the RICO provisions. 18

U.S.C. § 1964(c). The RICO statute authorizes venue for civil actions in any district in which the defendant "resides, is found, has an agent, or transacts his affairs." 18 U.S.C. § 1965(a). And it authorizes service of process "in any judicial district in which such person resides, is found, has an agent, or transacts his affairs," 18 U.S.C. § 1965(d), evidencing Congress' desire that "[p]rovision [be] made for nationwide venue and service of process." H. Rep. No. 91-1549, at 4 (1970), reprinted in 1970 U.S.C.C.A.N. 4007, 4010. Although 18 U.S.C. § 1965 is entitled "Venue and process," the fact that it also authorizes service of process makes it relevant to personal jurisdiction because of Federal Rule of Civil Procedure 4(k)(1)(D). "Where," as here, "Congress has authorized nationwide service of process ... so long as the assertion of jurisdiction over the defendant is compatible with due process, the service of process is sufficient to establish the jurisdiction of the federal court over the person of the defendant." Hogue v. Milodon Eng'g, Inc., 736 F.2d 989, 991 (4th Cir.1984); see also Republic of Panama v. BCCI Holdings (Luxembourg) S.A., 119 F.3d 935, 942 (11th Cir.1997) (section 1965(d) of RICO statute, providing for service in any judicial district in which defendant is found, provides statutory basis for personal jurisdiction).

The due process constraint on service under Federal Rule of Civil Procedure 4(k)(1)(D), is not, however, grounded in the Fourteenth Amendment, which circumscribes service under state process pursuant to Rule 4(k)(1)(A). See Republic of Panama, 119 F.3d at 942; Hogue, 736 F.2d at 991. Rather, it is the Due Process Clause of the Fifth Amendment which constrains the exercise of the federal government's sovereign powers. See id.; Omni Capital, 484 U.S. at 103-04, 108 S.Ct. at 409; Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites, 456 U.S. 694, 702 n. 10, 102 S.Ct. 2099, 2104 n. 10, 72 L.Ed.2d 492 (1982). The Fifth Amendment's Due Process Clause not only limits the extraterritorial scope of federal sovereign power, but also protects the liberty interests of individuals against unfair burden and inconvenience. See, e.g., Republic of Panama, 119 F.3d at 945- 48; cf. World-Wide Volkswagen, 444 U.S. at 291-92, 100 S.Ct. at 564 (noting that the minimum contacts test under the Fourteenth Amendment's Due Process Clause functions both to protect states in their status as equal sovereigns and to protect individuals against unfair burden and inconvenience). However, when the defendant is located within the United States, he "must look primarily to federal venue requirements for protection from onerous litigation," Hogue,

736 F.2d at 991, because "it is only in highly unusual cases that inconvenience will rise to a level of constitutional concern," Republic of Panama, 119 F.3d at 947.

In this case, both Centricut and Aley have been served with process in a judicial district where they respectively reside, are found, or transact their affairs. Because they have been validly served pursuant to RICO's nationwide service provision, 18 U.S.C. § 1965(d), in personam jurisdiction over them is established, provided that such jurisdiction comports with the Fifth Amendment. We believe that it does, discerning no evidence from the record in this case of such extreme inconvenience or unfairness as would outweigh the congressionally articulated policy of allowing the assertion of in personam jurisdiction in South Carolina. See 4 Wright & Miller, § 1067.1, at 331 (1987) (congressional policy choice that includes nationwide service of process "should be afforded substantial weight"); see also Republic of Panama, 119 F.3d at 948 (noting that "the burden is on the defendant" to show that the burden of distant litigation is so great as to put him at a "severe disadvantage"). Nor do we believe the dictates of judicial efficiency counsel so strongly against a federal forum in South Carolina that constitutional due process is offended.

While there is no doubt some inconvenience to the defendants in having to defend this action in South Carolina, it is not so extreme as to defeat the exercise of personal jurisdiction pursuant to valid service of process, although it may certainly factor into a transfer decision. See id. at 947 n. 25. Accordingly, we hold that the district court in South Carolina may constitutionally exercise in personam jurisdiction over both Centricut and Aley.

In so holding, we do not decide any issues of venue raised by the defendants. We note that although the district court essentially found that Centricut transacts its affairs in South Carolina by virtue of having suppliers and customers there, it made no findings as to whether Aley "transacts his affairs" (emphasis added) in South Carolina, as is required by 28 U.S.C. § 1965(a). That may mean that with respect to Aley venue is not proper in South Carolina under § 1965(a). The district court may ultimately have to decide whether venue is proper, either under 18 U.S.C. § 1965(a) or (b), or under the general venue statutes. The question of in personam jurisdiction, however, depends on whether service of process has been authorized. Section 1965(d) authorizes service of process "in any judicial district in which such person ... is found." Because service was

accomplished on the defendants where they were found, personal jurisdiction was established.

IV

Even though the district court has personal jurisdiction over the defendants to adjudicate the RICO claim because of its authorization for nationwide service of process, the question remains whether that service authorizes the district court to assert personal jurisdiction over the defendants to adjudicate the state law claims against them. If a defendant's conduct in the forum state provides insufficient contacts with the state to justify specific long-arm jurisdiction, two questions arise: First, whether the defendant has reasonable expectations not to be tried there on the state claims, which may not even arise under the laws of the forum state; and second, whether the defendant in these circumstances has a constitutional protection against adjudication of the state claims against him in a state which is not authorized to assert personal jurisdiction over him. These questions have not been answered in this circuit.

The existence of these questions highlights the substantial variations in authorization provided by the sources enumerated in Federal Rule of Civil Procedure 4(k) for service of process. Even for federal claims, the effective

territorial authority of the federal court may differ significantly from case to case, depending on the federal statute involved. For example, if the claim is based on a federal statute authorizing nationwide service of process, personal jurisdiction may be asserted over a defendant anywhere in the country, whereas if the statute creating the federal claim does not provide for nationwide service of process, process may extend only to the boundaries of the state in which the district lies. This poses an infrequently presented question: If a case includes a claim brought under a federal statute authorizing a nationwide service of process and another claim under a statute or under state law for which nationwide service of process is not available, does the court have personal jurisdiction over the defendant to adjudicate the entire case?

A somewhat analogous problem arose in the context of subject matter jurisdiction, which, of course, is quite distinct in principle from personal jurisdiction. See Compagnie des Bauxites, 456 U.S. at 701-05, 102 S.Ct. at 2103-06. Nevertheless, the analogy is useful. To resolve the problem of whether a federal court which is presented with the resolution of a federal claim may also resolve state claims arising out of the same nucleus of operative fact, the

Supreme Court developed the doctrine of pendent jurisdiction. See, e.g., United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). Under that doctrine, when a claim authorized by federal law and by Article III of the Constitution is properly in a federal court, and that claim is so related to a state claim not independently subject to federal jurisdiction that the two may be considered "one constitutional case," the federal court has pendent jurisdiction to adjudicate the state claim. Id. at 725, 86 S.Ct.at 1138. The Court articulated the necessary and proper relationship between the claims that they "must derive from a common nucleus of operative fact." Id . But even so, pendent jurisdiction is a discretionary power which is exercised in furtherance of "judicial economy, convenience and fairness to the litigants." Id. at 726, 86 S.Ct. at 1139. The doctrine has since been codified at 28 U.S.C. § 1367.

We believe that similar considerations urge that we recognize pendent personal jurisdiction of a district court which has obtained personal jurisdiction over a defendant by reason of a federal claim to adjudicate state claims properly within the court's subject matter jurisdiction, even

though that state's long-arm statute could not authorize service over the defendants with respect to the state claims.

When a federal statute authorizes a federal district court to exercise personal jurisdiction over a defendant beyond the borders of the district and the defendant is effectively brought before the court, we can find little reason not to authorize the court to adjudicate a state claim properly within the court's subject matter jurisdiction so long as the facts of the federal and state claims arise from a common nucleus of operative fact. The defendant will have to adjudicate the facts of the federal claim, and it could impose only a minimal burden to require the defendant to provide a defense on the factually- related state claim. We agree with the observation that

> judicial economy and convenience of the parties is best facilitated by a consideration of all legal theories arising from a single set of operative facts.... Once that set of facts and defendants are legitimately before th[e] court ... little would be gained by not requiring a defendant to defend against a certain type of theory superimposed upon those facts.

Sohns v. Dahl, 392 F.Supp. 1208, 1218 (W.D.Va.1975). Accordingly, we conclude that under the doctrine of pendent personal jurisdiction, the district court has authority over the defendants to decide both the federal and the state claims alleged against them. In recognizing pendent personal jurisdiction, we join the other circuits that have done so. See IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1056 (2d Cir.1993); see also Oetiker v. Jurid Werke, G.m.b.H., 556 F.2d 1, 4-5 (D.C.Cir.1977); Robinson v. Penn Central Co., 484 F.2d 553, 555 (3d Cir.1973).

Our recognition of pendent personal jurisdiction should present no constitutional objection any more serious than did pendent jurisdiction involving the court's subject matter jurisdiction. Once a court has a constitutional case, in the Article III sense, properly before it, service by a court sufficient to assert personal jurisdiction over a defendant by any authorized mechanism consistent with due process may be held to apply to the entire constitutional case. In this case, the parties agree that the federal court has subject matter jurisdiction over the ESAB Group's claims and is thus competent to adjudicate them. They also agree that the factual nucleus for the state claims and the RICO claim is

the same. Since the court has personal jurisdiction over the defendants under service of process authorized by the Federal Rule of Civil Procedure 4(k)(1)(D) and by the RICO statute, we can find no constitutional bar to requiring the defendants to defend the entire constitutional case, which includes both federal and state claims arising from the same nucleus of facts, so long as the federal claim is not wholly immaterial or insubstantial. See Republic of Panama, 119 F.3d at 942, 951 & n. 26.

For the reasons provided in this opinion, we reverse the ruling of the district court that the defendants were properly served under South Carolina's long-arm statute but affirm its conclusion that the district court has personal jurisdiction over Centricut and Aley. The case is remanded for further proceedings.

IT IS SO ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

The ESAB Group, Inc.,	) C.A. 4:96-168-2
	) Filed
Plaintiff,	) October 1, 1996
	) Larry W. Propes, Clerk
v.	) Florence, S.C.
	) Entered
Centricut, Incorporated,	) 10-3-96 AMC
Thomas Aley and John	)
Bergen,	) ORDER
	)
Defendants.	)
	)

The defendants, Centricut, Incorporated and Thomas Aley, filed a motion on July 26, 1996, moving the court to amend its oral Order of July 18, 1996, which denied the defendants' motion to dismiss for lack of personal jurisdiction. Defendant John Bergen joins in this motion. The plaintiff, The ESAB Group, Inc., filed a memorandum in opposition to the defendants' motion on August 23, 1996.

The defendants contend that the court's order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance

the ultimate termination of the litigation, and, therefore, that the court should authorize the defendants to file a petition for interlocutory appeal to the Fourth Circuit Court of Appeals. See 28 U.S.C. § 1292(b). The plaintiff argues that the court's order was based on a reasonable and correct interpretation of the case law and that there is no need for an interlocutory appeal of the jurisdictional issue.

The court relied on the reasoning set forth in Calder v. Jones, 465 U.S. 783, 104 S.Ct. 1482 (1984) and Burger King Corp.v. Rudzewicz, 471 U.S. 462, 104 S.Ct. 2174 (1985), in assuming personal jurisdiction over the defendants. The defendants contend that the court's ruling is contrary to the Fourth Circuit's analysis in Stover v. O'Connell, 84 F.3d 132 (4th Cir. 1996) and Federal Insurance Co. v. Lakeshore, Inc., 886 F.2d 654 (4th Cir. 1989).

After reviewing the record and the applicable law, the court concludes that there are substantial grounds for difference of opinion about whether jurisdiction exists, and that an immediate appeal may materially advance the ultimate termination of the litigation. Accordingly, the court hereby amends its oral Order of July 18, 1996, to

include the same, and grants the defendants authorization to file a petition for an interlocutory appeal.[1]

AND IT IS SO ORDERED.

s/ C. Weston Houck

C. Weston Houck

Chief United States
District Judge

October 1, 1996.
Florence, South Carolina

Circuit allows an appeal to be taken of the
, the proceedings in this court will not be
outcome of that appeal.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

ESAB GROUP., INC.,	)	
	)	
Plaintiffs,	)	No. 4:96-168-2
	)	
V.	)	
	)	
CENTRICUT, INCORPORATED ET AL	)	
	)	
	)	
Defendants.	)	
	)	

ORAL ORDER
EXCERPT FROM TRANSCRIPT OF
HEARING, JULY 18, 1996

The Court: This, of course is civil action 96-168, The ESAB Group, Inc. Plaintiff, against Centricut, Incorporated, Thomas Aley, John Bergen, Gordon Thomas Aley, Linda Aley, DBA Corbin Consulting, and Mark Lindberg, Defendants.

This matter is now before the court on motion of the defendants made pursuant to Rule 12(B)(6) of the Federal Rules of Civil Procedure to dismiss for lack of personal jurisdiction of the defendants.

When such a motion comes before the court by affidavit and the filing of other documents, a decision is

made by the court when it determines whether or not the plaintiff has made a prima facie case showing personal jurisdiction. When, however, we have an evidentiary hearing such as we've had in this case, and added to that certain documents filed by the parties, the court is called upon to determine whether or not the plaintiff, the person asserting jurisdiction, has shown the existence of such jurisdiction by a preponderance of the evidence.

It is pursuant to that obligation that the court examines the record in this case as it has been made and attempts to consider whether or not based thereon the plaintiff has carried its burden.

Obviously, any findings of fact that are made by the court at this time are made for the purposes of determining jurisdiction. The court may at a later date, if it's called upon to consider the evidence on the merits, or by way of some other motion that may be made, look at the facts in a different light, and certainly it's not obligated to adhere to its finding here today made at some later date. Any later findings of fact, whether that be made necessary at trial, or the consideration of the weight of the evidence or the existence of genuine issues of fact in motions for summary judgment will be considered de novo based upon what is before the court at that time. But because the motion to

dismiss, as outlined previously, is now before the court, it is compelled to make some findings of fact based upon the record, and it makes the following:

The plaintiff, ESAB Group, Inc., is a Delaware corporation with its home office and principal place of business in the County of Florence, State of South Carolina.

The defendant Centricut, Incorporated, is a limited liability company incorporated in the State of New Hampshire and having its principal place of business in that state.

The defendant Thomas Aley is now or was at all times relevant to this cause of action the CEO of the defendant, Centricut, and its president.

The defendant John Bergen was employed as a salesman for the plaintiff from on or about 1980 until on or about 1984, and again from on or about 1987 until on or about 1995. He has at all pertinent times been a resident of the State of Florida.

The plaintiff manufactures and sells welding and cutting products. It has been one of the major companies involved in that business for a number of years, is a worldwide company, and is at the present time the largest manufacturer and seller of welding and cutting products in the world. As has previously been found, its headquarters

are in the County of Florence, State of South Carolina. It has 800 employees in that office and 2200 employees in North America.

The defendant Centricut sells replacement parts that are used in welding machines manufactured by the plaintiff and others. The record indicates that it has some contractual relationship with the plaintiff, but that contractual relationship appears to be very minimal, and they are a competitor of the plaintiff in the business of manufacturing and selling replacement parts for the type equipment manufactured by the plaintiff.

Though the plaintiff has not always been a resident of South Carolina and has not always maintained headquarters and main manufacturing facilities there, it does at the present time and did at the time of the commencement of this action.

During the time that John Bergen was employed by the plaintiff, he was subject to certain confidentiality agreements, which, in general terms, prohibited him from disclosing outside of his business activities for the plaintiff certain confidential information that he came in possession of as a result of his employment by the plaintiff.

At some times during his period of employment by the plaintiff, the defendant John Bergen furnished to the

defendant Centricut, Incorporated, and its president and CEO, Thomas Aley, certain customer lists obtained by him from the plaintiff as a direct result of his employment by the plaintiff. And the defendants Centricut, Incorporated, and Thomas Aley used those customer lists to their advantage and to the disadvantage of the plaintiff in selling its products in competition with the plaintiff.

At all times when said customer lists were being furnished to the defendants Centricut, Incorporated, and Thomas Aley by John Bergen, all three said defendants knew that said customer lists were the property of the plaintiff and that their use as above described by Centricut, Incorporated, and Thomas Aley in competition with the plaintiff would cause the plaintiff damage. In fact, the purpose of obtaining said lists and using the same was principally to increase the competitive advantage of Centricut, Incorporated, over the plaintiff in the sale of replacement parts that both sold.

The result of the aforementioned acts on the part of the defendants Thomas Aley, John Bergen, and Centricut, Incorporated, in using the customer lists of the plaintiff was to cause the plaintiff substantial damage.

(The court conferred with his law clerk.)

The Court: Approximately one percent of the business of the defendant Centricut, Incorporated, is carried on in the State of South Carolina. They do not, however, have any offices or agents residing in the State of South Carolina and all of said business is service via telephone or other type interstate communication.

The defendant Bergen is, as stated, a resident of the State of Florida and was a resident of said state at all pertinent times. He does from time to time visit South Carolina. He is supervised out of the plaintiff's South Carolina offices, comes to South Carolina for sales meetings, as well as to bring customers to the manufacturing site of the plaintiff. It is estimated that he visits Florence between six and eight times per year. All of his sales are placed through the Florence office for manufacture and shipment.

In analyzing a challenge to the court's personal jurisdiction, we are called upon to first consider whether or not the state's long arm statute authorizes the exercise of jurisdiction over the defendants. If we conclude it does, we then determine whether the exercise of jurisdiction thereunder comports with the Fourteenth Amendment's due process requirements, so that the exercise of jurisdiction

does not offend traditional notions of fair play and substantial justice.

It has been repeatedly held that the South Carolina long arm statute authorizes jurisdiction to the limits of the due process clause.

Therefore, when considering a jurisdictional case such as this in South Carolina, the first question, the extent to which the long arm statute extends jurisdiction, folds into the second, a determination of whether or not the exercise of that jurisdiction violated the due process clause.

The due process clause protects an individual or corporation's liberty interest in not being subject to the binding judgments of a forum with which it has established no meaningful contacts, ties or relationships.

By requiring the existence of such contacts, ties or relations before jurisdiction will attach, the due process clause gives fair warning to individuals that a particular activity may subject them to the jurisdiction of a foreign state. It gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where they may have to answer for their acts in court.

Our search, of course, is to determine what contacts, ties or relations the defendants have with the State of South

Carolina. But that search is always made with the underlying consideration of fairness and justice as dictated by the due process clause.

As has been stated and as is stated in the case of Burger King Corporation against Rudzewicz, 105 S. Ct. 2174 at page 2183, the constitutional touchstone remains whether the defendant purposely established minimum contacts in the forum state. Although it has been argued that foreseeability of causing injury in another state should be sufficient to establish such contacts there, when policy considerations so require, the court has consistently held that this kind of foreseeability is not a sufficient benchmark for exercising personal jurisdiction.

Instead the foreseeability that is crucial to due process analysis is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there.

Obviously, in such an analysis as has been outlined by our courts, we must in this case, as in all cases, focus on the relationship among the defendants, the forum, and the litigation in question. We must also look to precedent to tell us what the constitution demands by way of contact with a foreign state before the person making that contact

can in fairness and under the requirements of due process be required to defend an action in the foreign forum.

We believe that the best guide in this case is provided by the Supreme Court decision of Calder v. Jones, a 1984 case, reported in 104 S.Ct. at page 1482; 465 U. S. 790.

That case involved two individuals, an editor, and a writer, the latter of whom wrote an allegedly defamatory article about a California resident, and the former who authorized the writing of that article, proofed the same and permitted it to be published.

The subject of the article was, of course, the plaintiff in a defamation action brought in California against those two individuals and, of course, the publication. The publication was not involved in this jurisdictional dispute in the Supreme Court.

They questioned jurisdiction in the California court on the grounds that they were residents of Florida and came to California on very infrequent occasions, either to visit, or in one case to investigate the article that was written on one occasion and several telephone calls to California for further investigation.

Under many of the cases that we read that deal with the question of what minimum contacts are necessary to

provide due process to a foreign defendant, these contacts would not be considered sufficient. Granted, our courts have held on many occasions that it is not necessary for a defendant to come into a state to be subject to its jurisdiction, but I know of no case that has held that the contacts found here to have been made with the forum state by the defendant South, who wrote the article, and the defendant Calder, who edited the same, would be sufficient to impose jurisdiction on them in California.

The Calder v. Jones case, however, did just that. And in doing so, it apparently adopted what it calls an effects test. In adopting that test, it made the following statement at page 1486:

In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is, therefore, proper in California based on the "effects" of their Florida conduct in California.

Continuing, their intentional, and alledgedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon the respondent Jones. An individual injured in California need not go to Florida to seek redress from persons who, though

remaining in Florida, knowingly cause the injury in California.

I think the situation that we are faced with in the instant case is, if not identical, strikingly similar to the one that the Court faced in Calder v. Jones.

The actions of the defendants were designed to damage the plaintiff, a South Carolina corporation, and did damage the plaintiff, just as the article in Calder v. Jones damaged a California resident and was designed to damage a California resident. It seems to the Court that it would be grossly unfair, and it would offend traditional notions of fair play and substantial justice to permit someone from outside a state to intentionally do acts designed to injure someone within that state, and then to somehow be able to say that they had no contacts with that state. And it, likewise, seems obvious to me that someone who commits such acts should foresee that such conduct will cause them to come into the state where the harm is done and have to answer for those wrongs.

I believe, therefore, that the plaintiff has established by a preponderance of the evidence that the defendants did commit purposeful acts which constituted contact with this state so as to impose upon them personal jurisdiction in this

state. I say that as to the defendant Centricut, Incorporated, the defendant Thomas Aley, and the defendant John Bergen.

There's no evidence that any of the other defendants had any knowledge of where the so-called lists came from, what the damage was, or who it damaged or where the damage may have been felt or imposed. I do not see how they could under any interpretation of the evidence before the court anticipate that they would be called into South Carolina to defend this action.

So the contacts that I believe are necessary to impose upon the defendants Centricut, Aley and Bergen, under the effects test are applicable only to those three named defendants and not the others.

To return to Burger King Corporation against Rudzewicz again, it recognizes in my judgment that the search for purposeful contacts with a state is most important in attaching personal jurisdiction, but that it does not always cause personal jurisdiction to attach. It teaches us that we should consider those contacts in the light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice.

Some of the factors that Burger King refers to on page 2184 of that opinion are the burden on the defendant. The forum state's interest in adjudicating the dispute, the

plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and I don't claim to know what that means, and the shared interest of the several states in furthering fundamental substantive social policies.

In considering those factors, I see nothing that would cause me to find that fair play and substantial justice would not be accomplished by attaching personal jurisdiction to the three defendants named.

The Burger King case goes on and says that even after the court finds constitutional contacts and even after it considers these other factors that I have named in determining whether or not the attachment of personal jurisdiction would comport with fair play and substantial justice, the defendants have the right and the court should give them a right to show that because of other considerations, personal jurisdiction should not attach. The Court talks about that they must not only show, they must make a compelling case that the presence of these other factors, or some of them, would render jurisdiction unreasonable, unfair and not in the interests of substantial justice. Those facts, as discussed on page 2185 of that opinion, are enumerated as follows:

The potential clash of the forum's law with the fundamental substantive social policies of another state may be accommodated, et cetera. Similarly, a defendant could show a substantial inconvenience if required to submit to jurisdiction in a foreign state.

I have looked at the requirements, or the considerations that the court gave there. I see none that cause the court to hesitate in attaching personal jurisdiction to this case. I see no unfairness. I see no substantial injustice that will be caused to any of the defendants if we attach personal jurisdiction. To the contrary, I believe that the plaintiff has shown by a preponderance of the evidence that the defendants Centricut, Incorporated, Thomas Aley and John Bergen have the necessary contacts with the State of South Carolina to comply with the requirements of due process and cause personal jurisdiction to attach to them in this action.

Therefore, as to those three defendants the motion of the defendant to dismiss is denied.

That motion is granted as to the defendants Gordon Thomas Aley, Linda Aley, DBA Corbin Consulting, and Mark Lindberg.

And it is so ordered.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 96-2504

ESAB GROUP, INCORPORATED,

Plaintiff - Appellee,

v.

CENTRICUT, INCORPORATED; THOMAS ALEY,

Defendants - Appellants,

and

JOHN BERGEN; THOMAS FITZPATRICK; GORDON THOMAS ALEY; LINDA ALEY, d/b/a Corbin Consulting; MARK LINDBERG,

Defendants.

Filed November 14, 1997

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor

Clerk